INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statement	4
Specifications of Errors to be Urged	6
Reasons for Granting the Writ	7
I. The court below has decided an important question of local law in a way clearly in conflict with local decisions	8
A. The decision below is in conflict with local decisions interpreting the meaning of insurance policy war clauses	10
1. No state of war existed between the United States and Japan when the insured was killed	10
2. Under Virginia law the policy exception is not applicable unless a state of war exists	11
B. The decision below is in conflict with local decisions which require all ambiguities to be resolved in favor of the insured	15
1. The opposing decisions of other jurisdictions are conclusive that the policy provisions are at least ambiguous	16
2. Under Virginia law any doubt or ambiguity must be resolved in favor of the insured	18
3. Utah law is the same as Virginia law	20
II. The court below has decided an important question of federal law which has not been but should be settled by this Court, in a way probably in conflict with decisions of this Court and squarely in conflict with decisions of other state and federal courts	22
A. The decision of the court below on this federal question is probably in conflict with applicable decisions of this Court	25
B. The decision of the court below on the same federal question is squarely in conflict with the decisions of the Circuit Court of Appeals for the Fifth Circuit and with three other state and territorial courts	26
Conclusion	27

Supreme Court of the United States

OCTOBER TERM, 1946

No.....

LOUISE C. BENNION, *Petitioner,*

v.

NEW YORK LIFE INSURANCE COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered on November 6, 1946 (R. 52), petition for rehearing denied December 28, 1946 (R. 76), reversing the judgment of the District Court of the United States for the District of Utah (R. 33-34).

OPINIONS BELOW

The District Court directed a verdict for the plaintiff, delivering a brief oral opinion from the bench (R. 32-33), which is not reported. The opinion and dissenting opinion of the Circuit Court of Appeals (R. 39-52) are reported at 158 F. 2d 260.

JURISDICTION

This is an action to recover double indemnity on a policy of life insurance, brought originally in the District Court of Salt Lake County, State of Utah. Pur-

suant to Section 28 of the Judicial Code as amended, 28 U. S. C. Sec. 71, the defendant removed the cause to the District Court of the United States for the District of Utah on the ground of diversity of citizenship, the amount in controversy being in excess of $3,000.00 exclusive of interest and costs, the plaintiff being a citizen of the State of Utah and the defendant being a corporation organized under the laws of the State of New York (R. 5-7).

Final judgment of the District Court in favor of the plaintiff for the sum of $12,270 and costs was entered on November 23, 1945 (R. 33). Notice of appeal to the United States Circuit Court of Appeals for the Tenth Circuit was filed on February 19, 1946 (R. 35), that Court having jurisdiction of the appeal under Sec. 128(a) and (d) of the Judicial Code as amended, 28 U. S. C. Sec. 225(a) and (d).

The final judgment of the Circuit Court of Appeals reversing the judgment of the District Court was entered on November 6, 1946 (R. 52). An order denying this Petitioner's petition for rehearing was entered on December 28, 1946 (R. 76). The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code as amended, 28 U. S. C. Sec. 347(a).

QUESTIONS PRESENTED

1. Whether under the law of Virginia (where this policy of insurance was executed and delivered) or under the law of Utah (the forum), the death of the insured from wounds sustained by him from the explosion of a bomb dropped by Japanese planes at the outset of the attack on Pearl Harbor on December 7, 1941, resulted from "war or an act incident to war" as those words are used in Section 2 of the Policy (R. 10).

2. Whether under applicable state law the fact that the decisions of every other jurisdiction in the United States that has decided the question, both federal and state, are contrary to the decision of the court below, is not sufficient evidence of ambiguity to require application of the rule that all doubtful insurance policy exceptions must be construed most favorably to the insured.

3. Whether the Circuit Court of Appeals for the Tenth Circuit may disregard the Joint Resolution of Congress on December 8, 1941, at 4:10 p. m. EST, and hold that the unilateral sneak and surprise attack of the Japanese at Pearl Harbor, December 7, 1941, by itself, constituted "a state of war between the Government of the United States and the Government of Japan" so as to defeat recovery under the double indemnity benefits of a life insurance policy excluding death resulting from war or any act incident to war, the insurance company having interpreted its own policy by its answer herein (R. 10), to define "war" as meaning "a state of war between the Government of the United States and the Government of Japan", when all other courts, state and federal, that have ruled on the question have held in interpreting similar or identical policies, that the Pearl Harbor attack was not war.

4. Whether determination of the question of when the war with Japan began is a question of local law merely because that is the controlling fact in construing a life insurance policy.

5. Whether the Circuit Court of Appeals for the Tenth Circuit may disregard the Joint Resolution of Congress declaring war on Japan and hold that the Commonwealth of Virginia could or would also disregard the Joint Resolution of Congress and hold that whether or not this country was at war with Japan was a ques-

tion for determination by the courts of that Commonwealth in fixing domestic rights under a domestic insurance policy delivered in the Commonwealth of Virginia.

STATEMENT

On or before May 23, 1925, the Respondent, New York Life Insurance Company, issued and delivered to Mervyn S. Bennion, the husband of Petitioner, in the Commonwealth of Virginia, a life insurance policy on his life in the sum of $10,000, with a provision for an additional payment of $10,000 if the insured's death resulted directly from bodily injury effected solely through external, violent and accidental cause. The policy provided that this double indemnity benefit "will not apply if the Insured's death resulted from war or any act incident thereto" (R. 2, 14). At the time the policy was issued Mervyn S. Bennion was a Naval Officer in the United States Navy, and the insurance company admittedly knew of this fact and exacted double premiums for the double indemnity benefit because of the insured's occupation (R. 15). The insured continued to serve in the United States Navy from that time until his death. On December 7, 1941, Captain Bennion was thus engaged in his usual occupation, on account of which he had paid the double premium. On this day he was the Commanding Officer of the USS *West Virginia,* which was anchored at Pearl Harbor, Hawaii, under peacetime holiday routine and was clearly not engaged in combat or war. He was killed immediately after the first alarm, during a lull in the first full-scale attack, being among the first of the Japanese victims (R. 18, 19). According to one witness, he was killed as he was proceeding to the bridge for better visibility to determine what it was all about (R. 18). It is admitted that his death resulted directly and inde-

pendently of other causes from bodily injury effected solely through external, violent and accidental cause on December 7, 1941 (R. 13).

On December 8, 1941, the day following the attack and Captain Bennion's death, the President of the United States delivered to Congress a message in which he stated:

> "Yesterday, December 7, 1941—a day which will live in infamy—the United States of America was suddenly and deliberately attacked by naval and air forces of the Empire of Japan.
>
> "The United States was at peace with that Nation and, at the solicitation of Japan, was still in conversation with its Government and its Emperor looking toward the maintenance of peace in the Pacific. Indeed, one hour after Japanese air squadrons had commenced bombing in Oahu, the Japanese Ambassador to the United States and his colleague delivered to the Secretary of State a formal reply to a recent American message. While this reply stated that it seemed useless to continue the existing diplomatic negotiations, it contained no threat or hint of war or armed attack.
>
> "Hostilities exist. . . . I ask that Congress declare that since the unprovoked and dastardly attack by Japan on Sunday, December 7, a state of war has existed between the United States and the Japanese Empire." (R. 16-18).

Congress did not accede to the President's request to antedate the declaration of war, but adopted a Joint Resolution to the effect that "a state of war exists between the Imperial Government of Japan and the Government and people of the United States", and that "the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally de-

clared". This Resolution was approved and became effective December 8, 1941, at 4:10 p. m., EST (R. 31, 32).

The Respondent insurance company paid the face of the policy, but refused to pay the double indemnity of $10,000 on the ground that the insured's death resulted from war. Petitioner thereupon brought suit in the Utah state court (R. 1). Respondent removed the cause to the District Court of the United States for the District of Utah on the ground of diversity of citizenship, where it was tried and a verdict directed for Petitioner in the sum of $12,270 and costs (R. 33, 34). On appeal the Circuit Court of Appeals for the Tenth Circuit reversed this judgment by a divided court, Circuit Judge Murrah and District Judge Broaddus constituting the majority, with Circuit Judge Huxman dissenting (R. 39-52). A timely petition for rehearing was denied on December 28, 1946, without further opinion (R. 76).

SPECIFICATION OF ERRORS TO BE URGED

The Court below erred:

1. In holding that under the laws of Utah and Virginia the death of Captain Mervyn S. Bennion, the insured, from injuries sustained in the explosion of a bomb dropped by Japanese planes at the outset of the attack upon Pearl Harbor on December 7, 1941, resulted from "war or an act incident to war" as those words are used in Section 2 of the policy (R. 10).

2. In failing and refusing to apply the well-settled law of the Commonwealth of Virginia that where a provision of an insurance policy is capable of two or more interpretations that construction is to be adopted which is most favorable to the insured.

3. In disregarding the Joint Resolution of Congress declaring war on Japan on December 8, 1941, at 4:10 p. m., EST (R. 31), and holding that whether or not this country was in war was determined by the Japanese by their secret intentions and sneak attack, and that the acts of the Japanese, not the Congress, fixed domestic rights under a domestic policy issued more than twenty-five years earlier.

4. In holding that under the applicable law, the death of the insured resulted from war when every other jurisdiction in the United States that has decided the question, both federal and state, has ruled that death caused by the Japanese attack at Pearl Harbor was not the result of war under policies identical in effect with that involved here.

5. In holding that the Commonwealth of Virginia could and would hold that in construing a domestic insurance policy delivered in that Commonwealth it had the right and power to determine that we were at war with Japan contrary to the joint resolution of Congress fixing a definite, different and subsequent time.

6. In holding that the determination of whether the United States was at war with Japan at the time of the insured's death is a local question for determination by local law in disregard of the Joint Resolution of Congress declaring war on Japan at a subsequent time.

7. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

To the extent that the question of the applicability of the insurance policy exception of death from "war or any act incident thereto" to a Pearl Harbor casualty is a question of state law, certiorari must be granted because the decision below is in conflict with applicable

local decisions, with the unanimous decisions of other jurisdictions, and with well accepted principles of local law which clearly indicate that the State courts would have reached a contrary result. *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169, 180.

To the extent that the decision below has decided that the Government of the United States was at war with Japan on December 7, 1941, prior to the passage of the Joint Resolution of Congress formally declaring war, certiorari must be granted because the decision below is probably in conflict with applicable decisions of this Court and is squarely in conflict with identical decisions of other state and federal courts, and because the court below has decided an important federal question which has not been but should be definitely settled by this Court.

I

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW IN A WAY CLEARLY IN CONFLICT WITH LOCAL DECISIONS

The insurance policy involved here was executed and delivered in Virginia at a time when the insured resided in that State (R. 1, 9); the law of Virginia therefore controls the interpretation to be placed upon it in accordance with universally accepted principles of conflict of laws, which the Utah courts (in which this cause originated) are, in the absence of any contrary indication, presumed to recognize. *Mutual Life Insurance Co.* v. *Johnson,* 293 U.S. 335, 339; *Restatement, Conflict of Laws,* Sec. 318. The question presented to the court below, therefore, was whether the exception in the policy of death "from war or any act incident thereto" was sufficiently clear and unambiguous under the law of Virginia to exclude from the policy the death of the

insured resulting from the Japanese attack on Pearl Harbor at a time when the United States and Japan were clearly not at war.

Although this precise question has not been passed upon by the Supreme Court of Appeals of Virginia, it is submitted that the decision below is clearly inconsistent with closely analogous decisions of that court and with principles of construction which have long been established by it, as well as being in square conflict with the decisions of four other state, territorial and federal courts—every other court, in fact, which has considered the question of whether Pearl Harbor casualties resulted from war within the meaning of this and similar insurance policy provisions. *Pang* v. *Sun Life Assurance Co.,* Supreme Court of Hawaii, October 24, 1945, 37 Haw. 208 (Advance Sheets); *Savage* v. *Sun Life Assurance Co.,* 57 F. Supp. 620 (W. D. La., 1944), appeal dismissed, April 25, 1945 (C.C.A. 5th) (unreported); *West* v. *Palmetto State Life Insurance Company,* 202 S.C. 422, 25 S.E.2d 475 (1943); *Rosenau* v. *Idaho Mutual Benefit Association,* 65 Idaho 408, 145 P.2d 227 (1944).

It is submitted that the crucial exception in this insurance policy of death resulting "from war or any act incident thereto" is neither doubtful nor ambiguous; the meaning of "war" under the law of Virginia as elsewhere is clear. If, however, as the court below seemed to think, there is doubt or ambiguity about this expression, the law of Virginia, which the court ignored after paying it lip service, is plain that this ambiguity must be resolved in favor of the insured. The fact that four other courts have decided the question contrary to the decision of the court below leaves no room for argument that the question is at least one of ambiguity.

A. THE DECISION BELOW IS IN CONFLICT WITH LOCAL DECISIONS INTERPRETING THE MEANING OF INSURANCE POLICY WAR CLAUSES.

In determining the applicability of the exception of death resulting from "war or any act incident thereto", the first question is of course whether the insured's death resulted in any way from a state of war; this in turn clearly depends upon whether at the time of the insured's death a state of war existed between the United States and Japan. The second question is whether the exception in the policy can be construed under the law of Virginia to apply even though a state of war did not exist. It is submitted that under this law it clearly cannot be so interpreted.

1. NO STATE OF WAR EXISTED BETWEEN THE UNITED STATES AND JAPAN WHEN THE INSURED WAS KILLED.

There is no dispute about the facts. Captain Bennion was killed in the first Japanese attack on Pearl Harbor. Not only had war not been declared, but at the very time of the attack Japanese envoys were conducting negotiations with our Government with respect to the continued maintenance of peace. The President in his message to Congress on December 8, 1941, stated that at the time of the attack we were "at peace", and that "hostilities exist"—not war; and he asked specifically that Congress declare that a state of war had existed with Japan since the time of the attack. The Joint Resolution of Congress, however, did not make a retroactive declaration of war, but provided merely that a state of war existed from the date of the Resolution—December 8, 1941.

Article I, Section 8 of the Constitution gives to Congress alone the power to declare war. Where Congress actually exercises this constitutional power and expressly refuses to make the declaration retroactive, it

is clear that a legal state of war does not exist prior to this action. As stated by John Bassett Moore (7 *International Law Digest* (1906) p. 153):

> "Much confusion may be avoided by bearing in mind the fact that by the term war is meant not the mere employment of force, but the existence of the legal condition of things in which rights are or may be prosecuted by force. Thus, if two nations declare war one against the other, war exists, though no force whatever may as yet have been employed. On the other hand, force may be employed by one nation against the other, as in the case of reprisals, and yet no state of war may arise. . . ."

See also Hudson, "The Duration of the War Between the United States and Germany", 39 *Harv. L. Rev.* 1020, 1027 (1926), to the effect that in spite of previous hostile acts a state of war between the United States and Germany did not exist prior to approval of the Joint Resolution of April 6, 1917.

2. UNDER VIRGINIA LAW THE POLICY EXCEPTION IS NOT APPLICABLE UNLESS A STATE OF WAR EXISTS

Under certain circumstances, it is possible that the words "war or any act incident thereto" may be said to contemplate something less than a state of war declared by a Joint Resolution of Congress, although to the extent they are so extended they clearly approach the field of ambiguity. This situation is typified by *The Prize Cases,* 2 Black 635, relied upon by the court below, in which war—in this case civil war—was determined to have existed after the issuance of Presidential proclamations, made while Congress was not in session, which were subsequently ratified by Congress. At least, however, the word "war" must contemplate, as stated by the Supreme Judicial Court of Massachusetts in

Stankus v. *New York Life Insurance Company,* 312 Mass. 366, 44 N.E.2d 687, 689 (1942), "a conflict between the armed forces of two nations *under authority of their respective governments*" (italics supplied). See also *Bas* v. *Tingy,* 4 Dall. 37, 40. Here Captain Bennion was killed before his Government even knew of the attack, and certainly before it had authorized any armed conflict.

If the word "war" is extended beyond a formally declared state of war and even beyond armed conflict pursuant to specific governmental orders, its meaning must become vague indeed. Typical examples of armed conflict which were clearly not war—although they might have eventually resulted in war—were the bombing of the USS *Panay* by the Japanese some years before Pearl Harbor and the recent attacks on United States aircraft by the Yugoslavs. Another such act, which like Pearl Harbor was in fact followed by war, was the attack on Fort Sumter on April 12, 1861. Clearly the fact that war did or did not subsequently follow a given belligerent act or encounter cannot be determinative of whether this act or encounter was itself war, as that term is commonly used. Many other instances of both types could be cited, but it is unnecessary to examine them further, for the Supreme Court of Appeals of Virginia has determined that even where war in fact follows, the preliminary belligerent acts do not themselves constitute war within the meaning of analogous provisions of an insurance policy unless a state of war can be said to exist as defined above. It is submitted that this decision, which was not cited by the court below, clearly indicates that under Virginia law a casualty of Pearl Harbor—or of Fort Sumter—would not be held to have resulted from "war". *Ports-*

mouth Insurance Co. v. *Reynolds,* 32 Gratt. 613 (Va. 1880); *cf. Innis* v. *Roane,* 4 Call 379, 397 (Va. 1797).

The *Portsmouth Insurance Co.* case was an action to recover on a fire insurance policy covering certain buildings near what is now the Norfolk Navy Yard in Portsmouth, Virginia. These buildings were destroyed by a fire set by federal military forces when they evacuated the Navy Yard on April 21, 1861, shortly after the secession of Virginia from the Union and some nine days after the firing on Fort Sumter. The policy excepted damage which happened "by means of invasion, insurrection, riot or civil commotion, or of any military or usurped power". The court assumed that under this clause the insurance company would be relieved of liability if the loss resulted from war or the "hostile acts of a foreign invader", but stated that "there was no war existing at that time between the United States and the State of Virginia" (p. 628). It held that the war did not begin until the formal proclamation of President Lincoln a few days later on April 27, 1861, citing *The Prize Cases, supra.* Accordingly, the court held that the exemption in the policy was clearly not applicable even though the loss resulted from hostile acts which would have been within the clause if a state of war had existed.

For still another reason is it clear that under Virginia law the policy exception of death resulting from "war or any act incident thereto" necessarily contemplates the existence of a formally declared or at least an officially recognized state of war. As the Supreme Court of Appeals said in *Robin* v. *Sydeman Bros., Inc.,* 158 Va. 289, 300, 163 S. E. 103, 106 (1932), "if a written contract is capable of more than one construction, then the courts will give it that construction which the parties have placed upon it." This is well established law in

Virginia, as elsewhere. *Revell* v. *Ballard,* 144 Va. 371, 374, 132 S. E. 322, 323 (1926); *Chick* v. *MacBain,* 157 Va. 60, 69, 160 S. E. 214, 217 (1931); *Thompson* v. *Inter-Ocean Casualty Co.,* 157 Va. 756, 763, 161 S. E. 907, 910 (1932); *First National Exchange Bank* v. *Roanoke Oil Co.,* 169 Va. 99, 115, 192 S. E. 764, 771 (1937); 3 *Williston Contracts* (Rev. Ed., 1936) Sec. 623. Throughout the trial of this case the Respondent as well as the Petitioner assumed that the crucial issue was whether a formally recognized state of war existed between the United States and Japan on December 7, 1941; the Answer specifically put this in issue by the allegation

> "That said Imperial Japanese Government did prior to the initial attack upon the United States as aforesaid formally declare the existence of a State of War between the Government of Japan and the United States, and did by said attack wage war against it. That at and prior to the time of the death of said Mervyn S. Bennion there was a state of war existing between the Government of the United States and the Government of Japan and that the death of said Mervyn S. Bennion resulted from war or an act incident to war. . . ." (R. 9-10).

This consistent interpretation of the policy exception as contemplating the existence of a formal "state of war" is, under applicable local law, controlling on the question of what the provision really means. In the words of the Virginia courts (*First National Exchange Bank* v. *Roanoke Oil Co., supra*),

> "The practical construction put by the parties upon the terms of their own contract is not only to be regarded, but, where there is any doubt, must prevail over the literal meaning of the contract."

Accordingly, unless there was a formal state of war between the United States and Japan on December 7,

1941, it is clear under Virginia law that the policy exception does not apply. As stated above, it seems plain that no formal state of war did in fact exist prior to the passage of the Joint Resolution of December 8, so that the decision below is squarely in conflict with applicable local law.

B. THE DECISION BELOW IS IN CONFLICT WITH LOCAL DECISIONS WHICH REQUIRE ALL AMBIGUITIES TO BE RESOLVED IN FAVOR OF THE INSURED

As pointed out above, it is believed that the only acceptable interpretation under Virginia law of the phrase "war or any act incident thereto" necessarily contemplates a formally declared or at least an officially recognized state of war between two nations. It is not necessary, however, to uphold this contention in order to show that the court below has decided an important question of local law in a way probably in conflict with local decisions. If, as set out more fully hereafter, the words of the policy are in any way ambiguous or doubtful, Virginia law clearly requires that they must be interpreted in favor of the insured and against the insurer who prepared the policy. In this case the unanimous decisions of other courts furnish clear and positive evidence that the words of the policy are both ambiguous and doubtful. At the very least, these decisions conclusively demonstrate that "the decision below was 'probably untenable' and therefore probably in conflict with the state law as yet unannounced by the highest court of the State." *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 206. This alone is sufficient reason for granting certiorari in this case. See also *Fidelity Union Trust Co.* v. *Field*, 311 U. S. 169; *Stoner* v. *N. Y. Life Ins. Co.*, 311 U. S. 464, 467; *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 226; *Six Companies*

of California v. *Joint Highway District No. 13,* 311 U. S. 180, 182; *Guaranty Trust Co.* v. *York,* 326 U. S. 99.

1. THE OPPOSING DECISIONS OF OTHER JURISDICTIONS ARE CONCLUSIVE THAT THE POLICY PROVISIONS ARE AT LEAST AMBIGUOUS

In *Pang* v. *Sun Life Assurance Co.,* decided October 24, 1945, 37 Haw. 208 (Advance Sheets), the Supreme Court of Hawaii held that an exemption clause identical with the one involved in this case was not applicable to a death resulting from the Pearl Harbor attack because it did not result from "war or any act incident thereto" as those words were used in the policy. The court examined the question exhaustively and concluded that the words plainly contemplated the existence of a state of war, as distinguished from hostile or belligerent acts, and that the exemption clause therefore did not apply. The United States District Court for the Western District of Louisiana reached the same result, again with an identical exemption clause, in *Savage* v. *Sun Life Assurance Co.,* 57 F. Supp. 620 (1944). The appeal in this case was dismissed by the Circuit Court of Appeals for the Fifth Circuit on April 25, 1945, at the cost of appellant (dismissal unreported).

In *West* v. *Palmetto State Life Insurance Company,* 202 S. C. 422, 25 S.E.2d 475 (1943), the Supreme Court of South Carolina held the exemption of an insured while "engaged in military or naval service in time of war" not applicable to a seaman killed in the attack on Pearl Harbor. Again the fully documented opinion considered the question to be plain and free from doubt. And finally, in *Rosenau* v. *Idaho Mutual Benefit Ass'n,* 65 Idaho 408, 145 P.2d 227 (1944), the Supreme Court of Idaho held inapplicable to a death resulting from the Pearl Harbor attack an exception

of death "while in military, naval, or air service of any country at war".

All four of these decisions treated the war exception clause as unambiguous and clearly inapplicable to the Pearl Harbor attack; none of them rested the decision upon the rule that ambiguities are to be resolved in favor of the insured, and in fact in only one of them—the *Rosenau* case—was this principle even mentioned. Where, therefore, four courts—three of them courts of last resort—construe identical or similar policy provisions as plainly inapplicable to a Pearl Harbor casualty, it is clearly erroneous for a federal court sitting for Utah—and so presumably not particularly qualified to speak on Virginia law—to hold not only that the Virginia courts would refuse to follow this weight of authority but that they would rule that the policy provisions have a clear and unambiguous meaning which is the *exact opposite* of what all these courts have held. How can it be denied that the meaning unanimously adopted by four courts is a permissible interpretation of a clause that is at least doubtful or ambiguous?

The very fact that the Circuit Court of Appeals disagrees with the trial court and that there is dissent in the Circuit Court of Appeals itself is proof of ambiguity. *Stroehmann* v. *Mutual Life Insurance Company,* 300 U.S. 435, 439; *cf. Mutual Life Insurance Company* v. *Hurni Packing Company,* 263 U.S. 167.

The two decisions principally relied upon by the court below—*Stankus* v. *New York Life Insurance Co.,* 312 Mass. 366, 44 N.E.2d 687 (1942), and *Vanderbilt* v. *Traveler's Insurance Co.,* 112 Misc. 248, 184 N. Y. Supp. 54 (Sup. Ct., 1920)—are not opposed to the Pearl Harbor decisions cited above, for both involved deaths resulting from an admittedly existing war between

Germany and Great Britain, while the United States was still at peace, and the decisions were rested upon this fact. Even if the cases on the question here presented could be said to be conflicting, however, this in itself would be evidence of the ambiguity of the policy provisions, which, under Virginia law, would have to be resolved in favor of the insured. As the court said in *Vollrath* v. *Central Life Insurance Co.,* 243 Ill. App. 181, 185 (1927), where the local law is similar to that of Virginia in this respect,

> ". . . it is eminently proper, in view of the emphatic divergence of the views of the courts, to apply the well-known rule of construction applicable to accident insurance policies, that where there is doubt or uncertainty as to the meaning of the terms employed, the language, being that of the insurer, must be liberally construed in favor of the insured. . . ."

2. UNDER VIRGINIA LAW ANY DOUBT OR AMBIGUITY MUST BE RESOLVED IN FAVOR OF THE INSURED

Virginia was one of the first states to enunciate clearly the doctrine that

> "The maxim that 'the words of an instrument shall be taken most strongly against the party employing them' is peculiarly appropriate in the construction of a policy of insurance . . ."

See *Georgia Home Insurance Co.* v. *Kinnier,* 28 Gratt. 88, 104 (Va. 1877). This doctrine has been followed in an unbroken line of cases. *United States Mut. Accident Ass'n* v. *Newman,* 84 Va. 52, 59, 3 S.E. 805, 808 (1887); *Stratton's Adm'r* v. *New York Life Ins. Co.,* 115 Va. 257, 270, 78 S.E. 636, 640 (1913); *Phoenix Ins. Co.* v. *Shulman Co., Inc.,* 125 Va. 281, 291, 99 S.E. 602, 605 (1919); *Williams* v. *Metropolitan Life Ins. Co.,* 139 Va. 341, 347, 349, 123 S.E. 509, 511 (1924); *Harri-*

son v. *Provident Relief Ass'n of Washington, D. C.*, 141 Va. 659, 671, 126 S.E. 696, 700 (1925); *Ayres* v. *Harleysville Mut. Casualty Co.*, 172 Va. 383, 389, 390, 2 S.E.2d 303, 305, 306 (1939).

In *Ayres* v. *Harleysville Mutual Casualty Co., supra,* the Court recently reaffirmed this rule in very strong language. It quoted with approval the following definition of "ambiguity" in the language of an insurance policy:

> "Words, language, or expressions which are capable of more senses than one, difficult to comprehend or distinguish, of doubtful import, of doubtful or uncertain nature, of doubtful purport, open to various interpretations, or wanting clearness or definiteness; in short, the effect of words that have either no definite sense or else a double one."

Only, therefore, where a valid policy provision plainly and *without ambiguity* denies recovery can it be given effect against the insured. The Virginia courts have, by their own statement, been in the vanguard of those jurisdictions which have applied this rule most liberally:

> "This court has gone as far as any court in enforcing insurance policies in favor of the assured and resolving all fair doubts in favor of the assured in such cases. . . ."

Bawden v. *American Central Insurance Co.*, 153 Va. 416, 427, 150 S.E. 257, 260 (1929).

The Virginia law in this regard is thus clear; and as pointed out above, the fact that every other court which has passed on the precise question presented here has reached a conclusion contrary to that reached below is equally conclusive that the policy provisions here involved are sufficiently "capable of more senses than one" to make this law applicable. The decision below,

made as it was by a divided court, can not be reconciled with these principles.

3. UTAH LAW IS THE SAME AS VIRGINIA LAW

The Circuit Court of Appeals for the Tenth Circuit said:

> "Since the contract was made in Virginia, its construction and effect will of course be governed by Virginia law. But the Virginia Courts have not spoken, and we therefore have the duty to determine what we conceive will be the law of Virginia when its courts do speak on the subject." (R. 41-42).

The Respondent New York Life Insurance Company did not attempt by pleading or by proof to rely upon the "law of Virginia", either as it existed at the time the policy was entered into or at the time of the death of the insured. The Respondent expressly declared in its answer that the death of the insured resulted from war because "at and prior to the time of the death of said Mervyn S. Bennion there was a state of war existing between the Government of the United States and the Government of Japan. . . ." (R. 10).

> "Courts do not, as a general rule, take judicial notice of the law of another state or country but require that such law be pleaded and proved like any other fact." (20 *Am. Jur.* p. 73, Sec. 48).
>
> "If the laws of another state are in any manner relied upon, they must be pleaded and proved law like any other facts. In the absence of proof to the contrary, they are assumed to be the same as the laws of the forum." (20 *Am. Jur.* pp. 71-72, Sec. 47), citing *Hartford Life Insurance Company* v. *Johnson,* 249 U. S. 490, and other cases.
>
> "There can, of course, be no doubt of the general principle that matters respecting the remedy—such as the form of the action, sufficiency of the pleadings, rules of evidence * * * —depend upon

> the law of the place where the suit is brought." *Central Vermont Ry. Co.* v. *White,* 238 U.S. 507, 511.

Under the law of the forum (Utah) the Respondent had the burden of proving that the insured's death resulted from a state of war. *Browning* v. *Equitable Life Assurance Society,* 94 Utah 570, 80 P.2d 348, 351 (1938). It did not sustain this burden, under either Utah or Virginia law. It relied upon the pleadings, including its own declaration that a state of war existed between the United States and Japan, and moved the court for a verdict in its favor (R. 32).

The trial court properly took the view that the Respondent had only succeeded in raising an uncertainty by its defense. It then applied the law of Utah, which is the same as the law of Virgina, and directed a verdict for Petitioner. The Supreme Court of Utah, also in *Browning* v. *Equitable Life Assurance Society,* 94 Utah 532, 543, 72 P.2d 1060, 1065 (1937) said:

> "The insurer made the contract, had its terms drawn with meticulous care and accuracy, and was therefore in a position to deny indemnity in many cases where the insured could reasonably believe he was insured. A recognition of the realities of this situation led the courts to give what was called a 'liberal' construction to such contracts. This really consisted of actually construing language to mean something which by its very terms it did not mean. But, if it were construed strictly according to its terms, it would have worked a denial of recovery in cases where it was believed the company meant to insure."

As this Court succinctly said in *Guaranty Trust Co.* v. *York,* 326 U. S. 99, 109:

> "The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* [304 U. S. 64] is that for the same

transaction the accident of a suit by a non-resident litigant in a federal court instead of in a state court a block away should not lead to a substantially different result."

The Petitioner brought this action in the state court of Utah, and had it remained there it is clear under the foregoing authorities, including the doctrine of the *Browning* case, that she would have prevailed and that the state court would have decided as did the United States District Court to which the cause was removed. If the question involved is solely one of local law the defendant should not be permitted, by removing the case to a federal court, to gain an advantage over the plaintiff and to secure a decision that would not have been rendered by the state court. The trial court applied the state law of Utah, as well as of Virginia, and the Circuit Court of Appeals for the Tenth Circuit ignored it.

II

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT, IN A WAY PROBABLY IN CONFLICT WITH DECISIONS OF THIS COURT AND SQUARELY IN CONFLICT WITH DECISIONS OF OTHER STATE AND FEDERAL COURTS

Because this litigation involves the interpretation of an insurance policy we have presented the foregoing reason why "a circuit court of appeals 'has decided an important question of local law in a way probably in conflict with applicable local decisions' ", and have "contended that the decision below was 'probably untenable' and therefore probably in conflict with the

state law as yet unannounced by the highest court of the State". *Ruhlin* v. *New York Life Insurance Company, supra,* 304 U. S. 202, 206.

However, the proper determination of this case depends in addition upon the correct answer to a vitally important question—were we actually and formally at war with Japan when the insured was killed. As pointed out above, the insurer interpreted its own policy to mean "a state of war existing between the Government of the United States and the Government of Japan" (R. 10). Whether such a state of war in fact existed when insured was killed is not a local or state matter; it is a federal question of great import. Either the Government of the United States was or it was not at war with Japan when the insured was killed. This Court alone can definitively determine the force and effect that must be given the Congressional Joint Resolution declaring war on Japan under authority of Article I, Section 8, paragraph 11, of the Constitution of the United States.

We are not dealing here with an undeclared war, hostilities, war between other nations, or other circumstances, real or imaginary, under which the word "war" has occasionally been construed by the courts. We are here dealing with the war with Japan. It was not declared by Congress until the day after the insured was killed. Whether or not we were at war with Japan prior to this declaration by Congress should not be left to the varying determinations of forty-eight states or the different Circuit Courts of Appeals. This Court should settle the question of when the war with Japan began so that there will be uniformity on that question, to which there can be only one correct answer. Under the Constitution Congress alone has the power to declare war. The Circuit Court of Appeals has decided

that an Act of Congress is not necessary to place us at war with a foreign power; that the declaration of Congress is of no importance, and that Japan and not Congress of the United States put this country into war.

For the purpose of municipal law a state of war does not exist with a foreign government until it is formally declared by a joint resolution of Congress approved by the President. Hudson, "The Duration of the war between the United States and Germany", 39 *Harv. L. Rev.* 1020 (1926), *supra;* Baldwin, "Share of the President of the United States in Declaring War", 12 *Am. Jour. Int. Law,* p. 1; Moore, 7 *International Law Digest* 153, *supra.*

> "The question whether or not war, in its legal sense, exists, is to be determined alone by the political power of the government; and of this determination the courts must take judicial knowledge.
>
> "It is not a question that can in any event be left to a jury."

Sutton v. *Tiller,* 6 Cold. 593, 98 Am. Dec. 471, 472 (Tenn., 1869). See also *United States* v. *Oglesby Grocery Company,* 264 Fed. 691 (N. D. Ga., 1920).

The court below acknowledged this doctrine when it said:

> "The existence or non-existence of a state of war is a political question, to be determined by the political department of our government." (R. 41).

It then refused by its decision to accept the determination of that department. In doing so, it decided an important question of federal law which has not been, but should be, settled by this Court. It decided this question in a way probably in conflict with applicable decisions of this Court; and finally it decided it in a way undeniably in conflict with the decisions of four other

federal, state, and territorial courts. For these additional reasons, this petition for certiorari should be granted.

A. THE DECISION OF THE COURT BELOW ON THIS FEDERAL QUESTION IS PROBABLY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

In *The Prize Cases,* 2 Black 635, this Court said: "By the Constitution, Congress alone has the power to declare a national or foreign war. . . . He (the President) has no power to initiate or declare a war either against a foreign nation or a domestic state." While this Court, in those cases, as dictum, also said that the President might repel an invasion without an Act of Congress, yet there actually existed there an Act of Congress and there actually existed a formal presidential proclamation which was later approved by Congress, and the war the Court was actually ruling upon was Civil War, for which there is never a formal declaration. In the case at bar there were no Acts of Congress, Presidential Proclamations or repelling of the invasion by the President, when Captain Bennion was killed. The President acted by seeking a Declaration of War from Congress.

At the time insured was killed, according to the President in his message to Congress, we were at peace with Japan. Congress declared war the following day. We were not at war with Japan or any other country, under any definition, nor was insured engaged in war when he was killed.

In *Bas* v. *Tingy,* 4 Dall. 37, this Court said, "it may . . . be safely laid down, that contention by force, between two nations, in external matters, under the authority of their respective governments, is not only war, but public war". At the time Captain Bennion

was killed there was no contention by force, between two nations, in external matters, under the authority of their respective governments. Neither by Congressional declaration nor by actual conflict were we at war when Captain Bennion was killed.

B. THE DECISION OF THE COURT BELOW ON THE SAME FEDERAL QUESTION IS SQUARELY IN CONFLICT WITH THE DECISIONS OF THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND WITH THREE OTHER STATE AND TERRITORIAL COURTS

The United States District Court for the Western District of Louisiana in *Savage* v. *Sun Life Assurance Co., supra,* 57 F.Supp. 620, decided that the United States was not at war with Japan at the time of the Pearl Harbor attack. This decision was appealed to the Circuit Court of Appeals for the Fifth Circuit and dismissed by that Court at appellant's cost, without opinion, April 27, 1945. We have been unable to find a record in the Reports of this dismissal and were advised of the foregoing by the Clerk of the Louisiana District Court. The decisions of the Supreme Court of Hawaii in *Pang* v. *Sun Life Assurance Co., supra,* of the Supreme Court of South Carolina in *West* v. *Palmetto State Life Insurance Co., supra,* and of the Supreme Court of Idaho in *Rosenau* v. *Idaho Mutual Benefit Ass'n, supra,* were also all decided in conflict with the decision of the Circuit Court of Appeals for the Tenth Circuit on this matter. All of the foregoing courts were construing insurance policies involving the meaning of the word "war". The war was the same war in all instances—the war with Japan—and all cases involved Pearl Harbor casualties, during a period prior to the Declaration of War by Congress. The cases were identical with the case at bar. There cannot be two correct but contrary determinations

of whether the United States was at war with Japan on December 7, 1941. The Circuit Court of Appeals for the Tenth Circuit says it may ignore all the cases and the Declaration of War by Congress. We are not concerned here only with the construction of an insurance policy under local law, but we are also concerned here with whether or not we were at war with Japan when the insured was killed—a question upon which that construction necessarily depends. That question we submit was determined by the political department of our Government and by that determination we are bound. That question is not merely a local question. Consideration of situations that might arise in the absence of that declaration by Congress are wholly irrelevant.

The declaration of war by Congress was not disregarded in this case until the decision of the Circuit Court of Appeals. Until then its force and effect were not judicially questioned. The decision of the court below is the first and only time that the declaration by Congress has been ignored. But by this decision, both the Constitutional provision that Congress shall have the power to declare war and the Congressional declaration enacted pursuant thereto, have been disregarded. This we submit, especially in view of the other decisions, presents an important reason for review by this Court.

CONCLUSION

As the decided cases now stand this one widow alone is deprived of the benefits of a policy taken out for her protection by her husband and for which he paid a double premium because of his occupation. He was only engaged in pursuing that occupation for which he had paid the double premium when he was killed. She is denied recovery by a United States Circuit Court of

Appeals when every other beneficiary has prevailed, and that denial has been in the face of and contrary to principles of law recognized by every jurisdiction including both those of the forum and those of Virginia. Aside from any other considerations than justice, equity and the rights of the Petitioner arising through our national tragedy, this case plainly calls for review by this Court of the divided decision of the Circuit Court of Appeals for the Tenth Circuit.

For the reasons set forth above, it is respectfully requested that this petition for a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit be granted.

Respectfully submitted,

SHIRLEY P. JONES,
Salt Lake City, Utah;
JOHN LORD O'BRIAN,
Washington, D. C.,
Attorneys for Petitioner

COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB,
Washington, D. C.,
Of Counsel

March, 1947.